

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 6 June 2024

Public Authority: Royal Borough of Greenwich
Address: The Woolwich Centre
35 Wellington Street
Woolwich
SE18 6HQ

Decision (including any steps ordered)

1. The complainant has requested a draft report and correspondence from Royal Borough of Greenwich ("the public authority"). The public authority refused to provide the requested information, citing regulation 12(5)(b) (the course of justice and inquiries exception).
2. The Commissioner's decision is that the regulation 12(5)(b) exception, as regards the "correspondence" is engaged and that the public interest was in maintaining the exception.
3. The Commissioner further decided that the regulation 12(5)(b) exception, as regards the draft report, is not engaged.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the draft report as attached to the email timed 21 February 2022 12:24 as he requested.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. The complainant, as a result of a prior information request, received information from the public authority.

Request and response

7. On 29 May 2023, the complainant wrote to the public authority and requested information in the following terms:

“Please may I make some further requests now that I have had the opportunity to consider the disclosed information¹ in more detail.

With regards to the draft skeleton of the addendum report, I am hoping to see the draft report as attached to the email timed 21 February 2022 12:21² and not the final report. Please may that draft report be shared.

Please may all correspondence sent to and received by Robert Bruce, Partner, Freeths LLP regarding the West Greenwich Lower Traffic Neighbourhood be disclosed.

Many thanks for your assistance. Please may you accept this email as a gentle reminder that EIR/FOI requests are made requestor blind and therefore my personal data as requestor should not be shared internally”.

8. On 6 Sept 2023, the public authority replied and refused to provide the requested information. It cited the following exception as its basis for doing so

- Regulation 12(4)(d) of the Environmental Information Regulations 2004 (the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data).

9. The complainant requested an internal review on 26 September 2023. The public authority sent him the outcome of its internal review on 24 October 2023. It upheld its original position.

¹ As per paragraph six above.

² The parties agree that the actual time of the email was 12:24.

Scope of the case

10. The complainant initially contacted the Commissioner on 29 October 2023 to complain about the way his request for information had been handled.

11. On 7 March 2024, the public authority issued a new response to the complainant. It said, amongst other things, as follows.

The information relating to the draft report as attached to the email timed 21 February 2022 12:24 is withheld under regulation 12(5)(b) of the Environmental Information Regulations 2004 (EIR).

and

The information relating to all correspondence sent to and received by (name withheld by the Commissioner), of Freeths solicitors Freeths LLP regarding the West Greenwich Lower Traffic Neighbourhood is also withheld under Regulation 12(5)(b)(EIR).

12. The Commissioner considers he has to determine whether the public authority was correct to rely on regulation 12(5)(b) to refuse to provide the requested information to the complainant.

Reasons for decision

Is the requested information environmental?

13. Regulation 2(1) of the EIR defines environmental information as being information on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
14. The Commissioner has considered the withheld information and determines it is environmental information as defined by EIR. In that it is concerned with measures that are likely to affect the elements and factors referred to in regulation 2(1) (a) and (b).

Regulation 12(5)(b)

15. Under regulation 12(5)(b) a public authority may refuse to disclose information to the extent that its disclosure would, amongst other things, adversely affect the course of justice. The exception is subject to the public interest test.

Public Authority's Submissions

16. The public authority is relying on regulation 12(5)(b) because disclosure would (in its opinion) adversely affect the course of justice as the withheld information attracts legal advice professional privilege.
17. The withheld information relates to email communications and a draft report that are communications between (name withheld by the Commissioner, of Freeths solicitors), the public authority's external legal adviser on the West Greenwich Lower Traffic Neighbourhood and officers of the public authority.
18. The confidential communications (which include emails and the comments made on the draft report referred to above) were made for the sole or dominant purpose of seeking and/or giving legal advice and is therefore covered by legal professional privilege ("LPP") on the basis of advice privilege.
19. The public authority is satisfied that the privilege attached to the withheld information has not been waived. These communications are exclusively for the purpose of giving or receiving legal advice.

Commissioner's Reasoning's

20. The Commissioner has viewed a copy of the draft report that is being withheld from the complainant.
21. There is nothing indicated in the report to suggest the involvement of a lawyer from Freeths solicitors in this matter. The draft report appears to have been authored by an employee of the public authority who is not identified as a lawyer. Additionally, there is no accompanying evidence to indicate the involvement of the said lawyer from Freeths, or indeed any other lawyer. The Commissioner, given the lack of evidence, finds that there is nothing to substantiate the claim that the draft report is a legally privileged communication between the public authority and a lawyer. The Commissioner therefore is not satisfied that the regulation 12(5)(b) exception is engaged as regards the withheld draft report.
22. The Commissioner next considered the following part of the request.
 - Please may all correspondence sent to and received by (name withheld by the Commissioner), Freeths LLP regarding the West Greenwich Lower Traffic Neighbourhood be disclosed.
23. The Commissioner has viewed a suite of emails that comprises of correspondence sent to and received by (name withheld by the Commissioner) of Freeths solicitors regarding the West Greenwich Lower Traffic. These are clearly communications between the public authority and a qualified lawyer where legal advice is sought and given. As such they are legally privileged and the Commissioner therefore considers the exception afforded by regulation 12(5)(b) is engaged.
24. Regulation 12(1)(b) requires that where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.

Public Authority Submissions

25. The public interest arguments for disclosure are:-
 - That there is a legitimate public interest in transparency and accountability as to how justice is administered, which would be furthered by the disclosure of the requested information.
 - It considers that there is a public interest in creating transparency in relation to Lower Traffic Neighbourhood matters and in highlighting the work of the Council relating to its planning functions.

26. The public interest arguments in maintaining the exception are:-

- Disclosing the requested information would prejudice its consideration of any future Lower Traffic Neighbourhood matters in Greenwich.
- Disclosure would result in adverse effects to the course of justice due to the undermining of the general principles of LLP.
- Disclosure would also inhibit the public authority's ability to defend its position in a matter that is controversial.

Commissioner's Reasonings

27. LPP is a fundamental principle of justice and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
28. The Commissioner is cognisant that the risk of the disclosure of legally privileged information (LPP), will contribute to a weakening of confidence in the general principle of LPP. This is a public interest factor of "very considerable weight" in favour of maintaining the exception. He further notes that there would have to be special or unusual factors in a particular case to justify not giving it this weight. The Commissioner is of the view there are no such factors in this case.
29. Whilst the Commissioner has noted the statutory presumption in favour of disclosure, he is satisfied that, the public interest favours maintaining the regulation 12(5)(b) exception.

Procedural Matters

Regulation 14 Refusal to disclose information

30. Regulation 14.—(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and (2) the refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
31. The complainant made his information request 29 May 2023, by its late reliance on regulation 12(5)(b) it breached regulation 14(2).

Regulation 5(2) of the EIR - Time for compliance

32. Regulation 5(1) of the EIR states that a public authority that holds information shall make it available on request and regulation 5(2) requires a public authority to provide that information within 20 working days following receipt of a request.
33. In this case, the complainant made his information request on 29 May 2023 and the public authority did not provide all the non-exempt information it held. The Commissioner therefore finds that the public authority has breached regulation 5(2) of the EIR as it did not provide all the information which was not exempt from disclosure within the required 20 working days.

Right of appeal

34. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Richard Lawanson
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